

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

FEB 28 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NATIONAL LABOR RELATIONS  
BOARD,

Petitioner,

v.

CAPAY, INC.,

Respondent.

No. 19-72050

NLRB Nos. 20-CA-215451

20-CA-215489

20-CA-215497

20-CA-222184

20-CA-224294

National Labor Relations Board

ORDER

The application (Docket Entry No. 1) of the National Labor Relations Board for enforcement of its August 1, 2019 order is granted. Unless objections as to form are received within fourteen days of the date of this order, the form of judgment submitted at Docket Entry No. 2 will be the judgment of the court.

The Clerk will serve the proposed judgment submitted at Docket Entry No. 2 on respondent.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT

By: Sofia Salazar-Rubio  
Deputy Clerk  
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	No.
	:	
Petitioner	:	Board Case Nos.:
v.	:	20-CA-215451
	:	20-CA-215489
CAPAY, INC. D/B/A FARM FRESH TO YOU	:	20-CA-215497
	:	20-CA-222184
Respondent	:	20-CA-224294

JUDGMENT

THIS CAUSE was submitted upon the application of the National Labor Relations Board for the enforcement of a certain order on consent issued by it against Respondent, Capay, Inc. d/b/a Farm Fresh to You, its officers, agents, successors, and assigns, on August 1, 2019, in Board Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294; and upon the record in that proceeding, certified and filed in this Court enforcing the order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Ninth Circuit that the order of the National Labor Relations Board be, and the same is hereby enforced; and that the Respondent, Capay, Inc. d/b/a Farm Fresh to You, its officers, agents, successors, and assigns, shall abide by and perform the directions of the Board set forth in its order. (See Attached Order and Notice)

Endorsed, Judgment Filed and Entered

/s/ Molly Dwyer  
Molly Dwyer  
Clerk

NATIONAL LABOR RELATIONS BOARD

v.

CAPAY, INC. D/B/A FARM FRESH TO YOU

**ORDER**

Capay, Inc. d/b/a Farm Fresh to You, West Sacramento, California, its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Suspending, discharging, demoting, or making unilateral changes to the terms and conditions of employment of the employees in the following appropriate unit (the unit) without first giving notice and an opportunity to bargain in good faith with the Bakery, Confectionery, Tobacco Workers & Grain Millers Union, Local 85 (the Union) as the exclusive collective-bargaining representative of the unit:  
  
All full-time and regular part-time warehouse employees employed by Respondent at its facility located at 3880 Seaport Boulevard, West Sacramento, California, including packers, lead packers, prepping, and lead prepping employees, and excluding maintenance, shipping, clerical, supervisory, and guard employees as defined by the Act.
2. Changing Personnel Policies without first giving the Union notice and an opportunity to bargain about the change.
3. Issuing discipline to employees based on inconsistent application of the Bathroom Break Policy.
4. Inconsistently applying the number of errors an employee is allowed to make per week prior to receiving discipline (Error Policy) without first giving the Union notice and an opportunity to bargain.
5. Issuing discipline to employees based on the inconsistent application of the Error Policy.
6. Discharging, suspending or demoting employees without first giving the Union notice and an opportunity to bargain over the discharge, suspension, or demotion.

7. Denying injured employees modified duty because of their union membership or support, or because they engage in protected concerted activity.
  8. Maintaining a policy that denies off-duty employees access to the worksite without prior authorization from their supervisor.
  9. Denying off-duty employees access to the worksite because of their protected concerted activity.
  10. Interfering with employee Section 7 rights by directing employees not to speak with other employees on break time, directing employees not to speak about non-work-related matters, denying employees the right to speak with other employees, interfering with employee break times, sequestering employees from other employees, or imposing more onerous working conditions on employees.
  11. Engaging in surveillance of employees' protected concerted activity, not to include the legitimate use of video cameras throughout the facility to preserve food safety.
  12. Threatening employees with reprisals for engaging in protected concerted activity.
  13. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- B. Take the following affirmative action necessary to effectuate the policies of the Act.
1. Upon the Union's request, rescind the prohibition against unit employees using the restroom when their Lead is not in the production area to grant permission, and provide the Union the opportunity to bargain over the Bathroom Break Policy.
  2. Remove from the Respondent's files all references to the discipline issued to Leticia Aracely Bribiesca and any other employees based on the inconsistent application of the Bathroom Break Policy and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.
  3. Upon the Union's request, revert the Error Policy to allow unit employees four (4) errors per week before being subject to discipline and provide the Union an opportunity to bargain over the Error Policy.

4. Remove from the Respondent's files all references to discipline issued under the inconsistent application of the Error Policy to employees who made four (4) or less errors per week, including, but not limited to, the discipline referenced in subparagraph 7(g) of the Consolidated Complaint, and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.
5. Immediately, and no later than five (5) days from the approval of this Stipulation, provide the Union with an opportunity to bargain over paycheck distribution dates until agreement or impasse is reached.
6. Provide advance notice to the Union and, upon the Union's request, bargain in good faith with the Union before discharging, suspending or demoting any unit employees, unless exigent circumstances prevent such notice.
7. Remove from the Respondent's files all references to the Respondent's January 24, 2018, suspension of Leticia Aracely Bribiesca without giving the Union notice and an opportunity to bargain, make her whole for any wages and other benefits she may have lost because the Respondent suspended her without giving the Union notice and an opportunity to bargain about the suspension, and notify her in writing that this has been done and that the suspension will not be used against her in any way.  
**Bribiesca did not lose any wages or benefits as a result of her suspension.**
8. **Within fourteen (14) days of the issuance of the Board's Order, make Rosalba Cecilia Reyes whole for any wages and other benefits she may have lost because the Respondent denied her modified duty, which has been offset by the temporary disability benefits she received through the Workers' Compensation Appeals Board, by paying her \$2,105.81, less appropriate withholdings. The Respondent shall complete and file with the Regional Director for Region 20 a report for the Social Security Administration provided by Region 20 allocating the backpay to the appropriate calendar year, which Region 20 will transmit to the Social Security Administration.**
9. Revise the policy that denies off-duty employees access to the worksite without prior authorization from their supervisor to make it consistent with current Board law and give the Union notice and the opportunity to bargain over the revision.
10. Within fourteen (14) days of service by the Region, post at its facility in West Sacramento, California, copies of the attached Notice (Notice)

marked "Appendix A." Copies of the Notice, on forms provided by Region 20, after being signed by the Respondent's authorized representative, shall be posted for a period of sixty (60) days, in conspicuous places, including all places where notices to its employees are normally posted. The Respondent will take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility in West Sacramento, California, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former unit employees employed by the Respondent at any time since October 1, 2017.

11. Within twenty (20) days of the issuance of the Board 's Order, file with the Regional Director of Region 20 of the Board, a sworn affidavit from a responsible official describing with specificity the manner in which the Respondent has complied with the terms of the Board's Order, including the locations of the posted documents.

**APPENDIX A**  
**NOTICE TO EMPLOYEES**  
**POSTED BY ORDER OF THE**  
**NATIONAL LABOR RELATIONS BOARD**  
**An Agency of the United States Government**  
**PURSUANT TO A STIPULATION PROVIDING**  
**FOR A BOARD ORDER AND A CONSENT JUDGMENT**  
**OF ANY APPROPRIATE UNITED STATES COURT OF APPEALS**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

Form, join, or assist a union;  
Choose a representative to bargain with us on your behalf;  
Act together with other employees for your benefit and protection;  
Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** suspend, discharge, demote, or make unilateral changes to the terms and conditions of employment of you employees in the following appropriate unit (the unit) without first giving notice and an opportunity to bargain in good faith with the Bakery, Confectionery, Tobacco Workers & Grain Millers Union, Local 85 (the Union) as the exclusive collective-bargaining representative of the unit:

All full-time and regular part-time warehouse employees employed by Respondent at its facility located at 3880 Seaport Boulevard, West Sacramento, California, including packers, lead packers, prepping, and lead prepping employees, and excluding maintenance, shipping, clerical, supervisory, and guard employees as defined by the Act.

**WE WILL NOT** change our Personnel Policies applicable to you without first giving the Union notice and an opportunity to bargain about the change.

**WE WILL NOT** discipline you based on inconsistent application of our Bathroom Break Policy.

**WE WILL NOT** inconsistently apply the number of errors you are allowed to make per week prior to receiving discipline (Error Policy) without first giving the Union notice and an opportunity to bargain.

**WE WILL NOT** discipline you based on the inconsistent application of the Error Policy.

**WE WILL NOT** discharge, suspend, or demote you without first giving the Union notice and an opportunity to bargain over the discharge, suspension, or demotion.

**WE WILL NOT** deny you modified duty because of your union membership or support, or because you engage in protected concerted activity.

**WE WILL NOT** maintain a policy that denies off-duty employees access to the worksite without prior authorization from their supervisor.

**WE WILL NOT** deny you access to the worksite because of your protected concerted activity.

**WE WILL NOT** interfere with your Section 7 rights by directing you not to speak with other employees on break time, directing you not to speak about non-work-related matters, denying you the right to speak with other employees, interfering with your break times, sequestering you from other employees, or imposing more onerous working conditions on you.

**WE WILL NOT** engage in surveillance of your protected concerted activity (not to include the legitimate use of video cameras throughout the facility to preserve food safety).

**WE WILL NOT** threaten you with reprisals for engaging in protected concerted activity.

**WE WILL NOT**, in any like or related manner interfere with, restrain, or coerce you in the exercise of your Section 7 rights.

**WE WILL**, upon the Union's request, rescind the prohibition against unit employees using the restroom when their Lead is not in the production area to grant permission, and provide the Union the opportunity to bargain over the Bathroom Break Policy.

**WE WILL** remove from our files all references to the discipline issued to Leticia Aracely Bribiesca and any other employees based on the inconsistent application of the Bathroom Break Policy and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

**WE WILL**, upon the Union's request, revert the Error Policy to allow unit employees four errors per week before being subject to discipline and provide the Union an opportunity to bargain over the Error Policy.

**WE WILL** remove from our files all references to discipline issued under the inconsistent application of the Error Policy to employees who made four (4) or



less errors per week, including, but not limited to, the discipline referenced in subparagraph 7(g) of the Consolidated Complaint, and we will notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

**WE WILL** immediately, and no later than five (5) days from the approval of this Stipulation, provide the Union with an opportunity to bargain over paycheck distribution dates until agreement or impasse is reached.

**WE WILL** provide advance notice to the Union and, upon the Union's request, bargain in good faith with the Union before discharging, suspending or demoting any unit employees, unless exigent circumstances prevent such notice.

**WE WILL** remove from our files all references to the January 24, 2018, suspension of Leticia Aracely Bribiesca without giving the Union notice and an opportunity to bargain, make her whole for any wages and other benefits she may have lost because we suspended her without giving the Union notice and an opportunity to bargain about the suspension, and notify her in writing that this has been done and that the suspension will not be used against her in any way.

**WE WILL** make Rosalba Cecilia Reyes whole for any wages and other benefits she may have lost because we denied her modified duty, to be offset by any temporary disability benefits she received through the Workers' Compensation Appeals Board.

**WE WILL** revise the policy that denies off-duty employees access to the worksite without prior authorization from their supervisor to make it consistent with current Board law, and give the Union notice and the opportunity to bargain over the revision.

**WE WILL NOT**, in any like or related manner, interfere with your rights under Section 7 of the Act.

**CAPAY, INC. D/B/A FRESH FOOD TO YOU**

The Board's decision can be found at [www.nlrb.gov/case/20-CA-215451](http://www.nlrb.gov/case/20-CA-215451) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

